In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

BRIEF OF AMICUS CURIAE (STATE OF UTAH) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

VERNON B. ROMNEY
Attorney General
M. REID RUSSELL
Chief Assistant Attorney General
STATE OF UTAH
236 State Capitol
Salt Lake City, Utah 84114

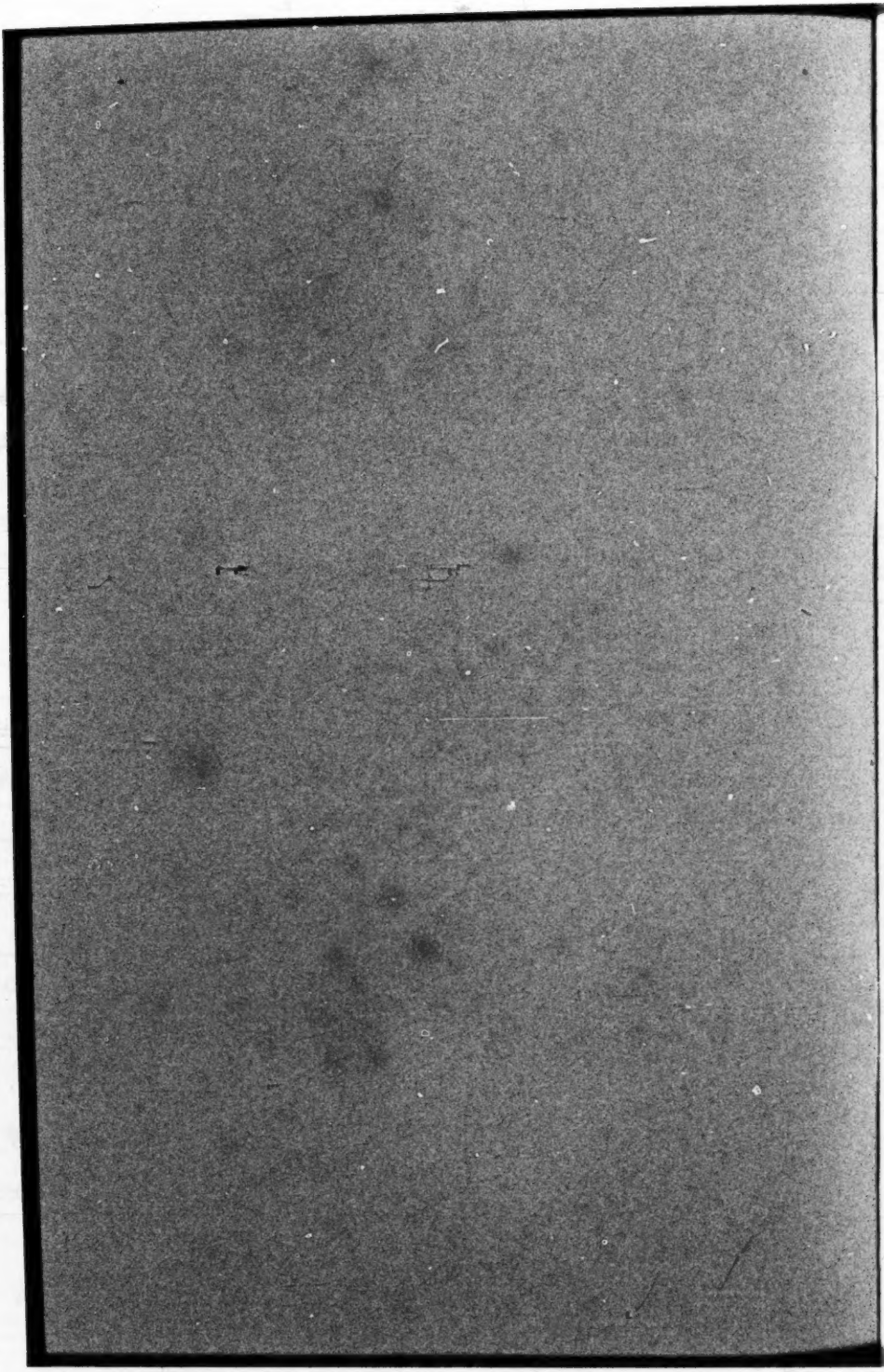


TABLE OF CONTENTS

CASES CITED

STATUTES CITED

CONSTITUTIONS CITED

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly sittuated,

Respondents.

BRIEF OF AMICUS CURIAE (STATE OF UTAH) IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

The State of Utah respectfully submits this Brief Amicus Curiae through its Attorney General, Vernon B.

Romney, thereby supporting Petitioner's Petition for Writ of Certiorari.

This Brief adopts the entire argument laid forth by petitioner heretofore filed in this Court, and further submits that the cause should be reversed because of the important relationships and rights of the state court system which have been abridged.

ARGUMENT

A UNITED STATES DISTRICT COURT JUDGE HAS NO JURISDICTION TO INTERFERE BY DECLARATORY AND INJUNCTIVE ACTION WITH DULY CONSTITUTED STATE CRIMINAL PROCEEDINGS ON THE QUESTION OF PRELIMINARY HEARINGS.

The conflict between State and Federal courts as pertaining to injunctions has been an age old battle which should have been well settled by earlier decisions of the United States Supreme Court that have limited the power of District Courts in granting injunctions which interfere with state proceedings. Such holdings have often, however, as in the present case, been ignored by the lower Federal Courts in grasping for standards they feel should apply.

The United States Congress emphasized the separation of Federal and State Systems by enacting what has become known as the "anti-injunction statute." This is found in 28 U. S. C. § 2283 and states:

> "A court of the United States may not grant an injunction to stay proceedings in a state court ex-

> cept as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Therefore, not only is there a presumption against federal interference but clearly, the language of the statute indicates the express desire that only through granted exception can injunctive relief be granted.

This position has been upheld by the United States Supreme Court in *Atlantic Coastline R. R.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970), where the Court said the following:

> "[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their Courts, the exceptions should not be enlarged by loose statutory construction."

The present case finds the lower court attempting to do that which the Court deplored above. The simple belief that the lack of preliminary hearings "could" be disadvantageous if certain circumstances arise surely does not meet any of the exceptions alluded to.

As early as *Stefanelli* v. *Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951), this Court held that Federal Courts should not intervene in state criminal proceedings on the grounds that those proceedings violate procedural due process. Indeed, this position has never been abandoned. It has been expanded and molded through such decisions

as *Dombrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), that limited federal intervention to injunctions of constitutionally violative statutes, and *City of Greenwood* v. *Peacock*, 384 U. S. 808, 86 S. Ct. 1800, 16 L. Ed. 2d 944 (1966), where the Court refused to uphold an injunction based on the argument that the defendants could not get a fair trial in the state courts.

Recently, this Court reiterated and restored to this controversy a well set out guideline as to the issuance of injunctions. The case of *Younger* v. *Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), defined the proper relationship between federal district courts and pending state court criminal proceedings, holding that an injunction or declaratory judgment will issue in a pending situation only under extraordinary circumstances that must include bad faith law enforcement. This is harmonious with the established custom of the federal courts to respect and confide in the competence of state courts. This Court did not limit *Younger*, *id.*, to bad faith law enforcement, but to harassment, or any other unusual circumstance that would call for equitable relief. Such must be shown to the judge sitting in the case.

In defining even further this relationship, the Court said in *Younger*, *id.*, that the federal system must be one:

> ". . . in which there is sensitivity to the legitimate interests of both state and National Governments, and in which National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

It is the position of the State of Utah that the reversal of the Court of Appeals is absolutely essential in adhering to the standards this Court has established in *Younger, id.*, and in earlier cases. For, in analyzing the facts of the pending appeal, it is most certainly evident that no convincing showing was made that irreparable injury would occur by normal implementation of the state court process.

This Court has never held that every injury beyond that associated with the defense of a single prosecution constitutes an irreparable injury. It has indicated in *Younger*, id., however, that injury that is incidental to every criminal prosecution is not irreparable. *Fenner* v. *Boykin*, 271 U. S. 240 (1926), as well as other cases indicate that a cardinal element of irreparable harm is the requirement common to all equity proceedings and that the plaintiff have no adequate legal remedy.

Though normal state criminal proceedings might not including a preliminary hearing, an individual is still capable of raising not only constitutional issues, but in challenging any procedure imposed on him at or before trial. Simply because he raises the issues of preliminary hearing, and the state does not have such a hearing, does not mean that the individual is entitled to obtain an injunction from the federal judiciary. Rather, recent decisions of this Court alluded to below indicate he does not have such a right.

In two recent decisions, this Court has upheld the holding previously cited from *Younger, supra.* Specifically, in *Oshea* v. *Littleton*, ... U. S. ....., 94 S. Ct. 669 (1974), the Court said:

"Respondents have failed, moreover, to estab-

> lish the basic requisites of the issuance of equitable relief in these circumstances — the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. We have already canvassed the necessarily conjectural nature of the threatened injury to which respondents are allegedly subjected. And if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which would provide relief from the wrongful conduct alleged. In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available."

Such remedies are available in Florida although it is readily admitted that the factual differences of the two cases are substantial. What is to be pointed out is simply that the elements of irreparable and immediate injury must be proven and if not proven there must be clear evidence that no remedies exist at law. This the defendants have failed to establish.

Finally, *Steffel* v. *Thompson*, ... U. S. ....., 94 S. Ct. 1209 (1974), is supportive of *Younger, id.*, the Court therein making the following remarks relating to the issuance of an injunction against state proceedings:

> "But, except for statutes that are 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph . . .' Younger v. Harris, *supra*, 401 U. S., at 53, 91 S. Ct., at 755, the rationale of those cases has no such basis. Their direction that federal courts not interfere with state prosecutions does not vary depending on the closeness of the constitutional issue or on the degree of confidence which the federal court possesses in the correctness of its conclusions

> on the constitutional point. Those decisions instead depend upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the state's interest in enforcing its own criminal laws, considerations which are as relevant in guiding the action of a federal court which has previously issued a declaratory judgment as they are in guiding the action of one which has not."

The Tenth Amendment to the Constitution specifically allows the States to handle those matters which concern its procedure, for:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Certainly the right to govern and control one's criminal processes — especially where there is no indication of harm or a denial of rights — belongs to the state courts and the laws they interpret. To hold otherwise would be a flagrant abridgement of this Supreme law of the land.

It is therefore submitted to this Court that the Court of Appeals erred in allowing the issuance of the injunction to stand. Such usurpation of authority has never been intended by this Court "unless" there is irreparable injury which has not been established in this case.

CONCLUSION

It is because of this long-standing precedence cited above that the State of Utah as *Amicus Curiae* in this action propounds to this Court that the federal judiciary

should not be permitted to interfere with proper state court criminal proceedings. Indeed, it is imperative that the states be permitted to carry on unfettered their respective law enforcement efforts and prosecutions. Such separations of powers was clearly intended by the Tenth Amendment to the United States Constitution, quoted above.

It is therefore submitted that the Court of Appeals should be reversed, which action requires first the granting by this Court of the State of Florida's petition for writ of certiorari.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General
for the State of Utah

M. REID RUSSELL
Chief Assistant Attorney General

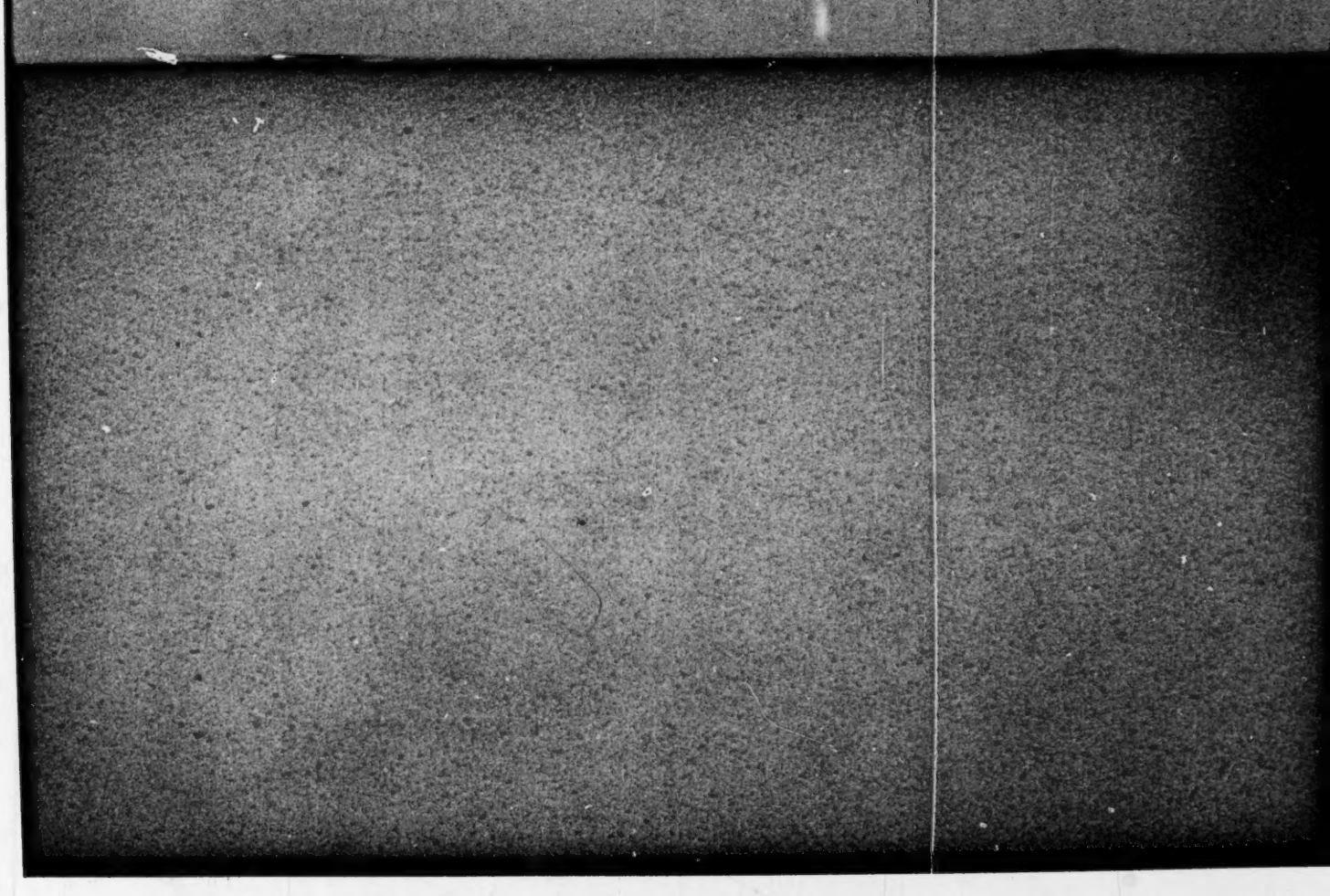
236 State Capitol
Salt Lake City, Utah 84114

CERTIFICATE OF SERVICE

I, M. Reid Russell, Chief Assistant Attorney General for the State of Utah, Counsel for *Amicus Curiae*, hereby certify that on the 8th day of August, 1973, I served copies of the Brief of *Amicus Curiae* on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents; and Peter L. Nimkoff, Esquire, Suite 607 Ainsley Building, 14 N. E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by a duly addressed envelope with postage prepaid.

M. REID RUSSELL
Chief Assistant Attorney General

AMICUS CURIAE BRIEF



IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974
No. 73-477

RICHARD E. GERSTEIN, State Attorney for 11th Judicial Circuit of Florida,
Petitioner,

vs.

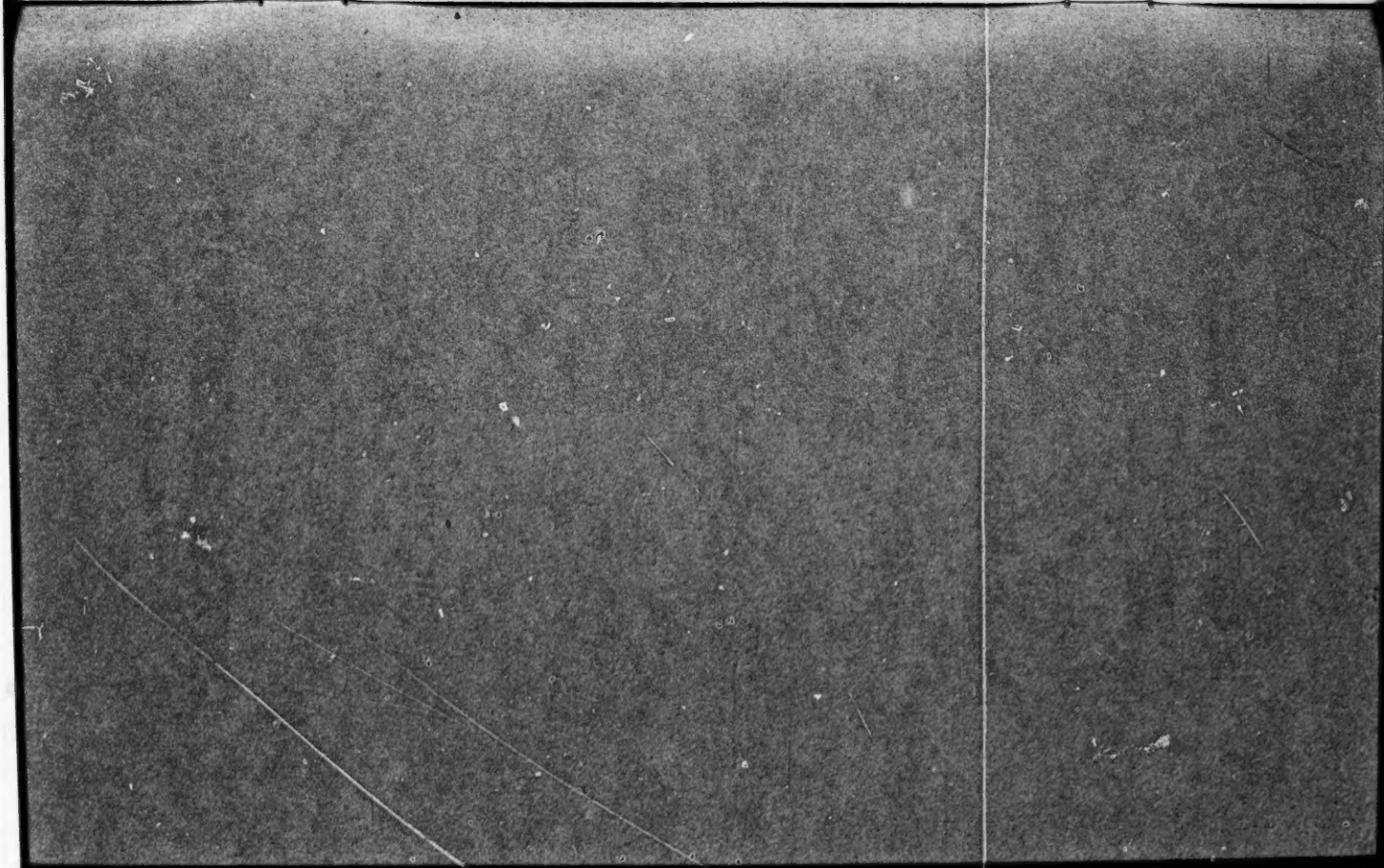
ROBERT PUGH, *et al.*
Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,
MALACHY R. MURPHY,
Deputy Attorney General,
KEVIN M. RYAN,
Assistant Attorney General.

Temple of Justice, Olympia, Washington 98504

STATE PRINTING PLANT OLYMPIA, WASHINGTON



IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974
No. 73-477

RICHARD E. GERSTEIN, State Attorney for 11th Judicial Circuit of Florida,

Petitioner,

vs.

ROBERT PUGH, *et al.*

Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

SLADE GORTON,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

KEVIN M. RYAN,
Assistant Attorney General.

Temple of Justice, Olympia, Washington 98504

INDEX AND CONTENTS

TABLES OF AUTHORITY

Table of Cases

OTHER SOURCES

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974
No. 73-477

RICHARD E. GERSTEIN, State Attorney for 11th Judicial Circuit of Florida,
Petitioner,

vs.

ROBERT PUGH, *et al.*
Respondent.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON

This brief is filed as an amicus curiae in the case of *Gerstein v. Pugh*, No. 73-477 at the invitation of the Clerk of the Supreme Court of the United States by letter dated June 6, 1974. Washington is among those states which, like Florida, does not require a preliminary hearing to be held following the prosecutor's filing an information on a criminal charge. A prosecutor may obtain a preliminary hearing by filing a complaint in an inferior court which will conduct a preliminary hearing. However, the prosecutor need not take this course of commencing criminal action, or he may, after filing the

complaint, avoid the preliminary hearing by filing an information in superior court. Normally, a prosecutor who is uncertain of probable cause to proceed to trial files a complaint to get a judge's view.

The general questions which we see predominant in this case are:

(1) Does *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), require the court to abstain from ruling on this matter because such ruling would affect the constitutionality of a state statute and a criminal action in progress?

(2) Does the fourteenth amendment due process clause as applied to the fourth amendment prohibiting unreasonable searches and seizures require that a preliminary hearing be conducted following the filing of a prosecutor's information?

(3) Does the mechanism of the prosecutor's information fulfill the requirement for due process in the criminal system even though no preliminary hearing is employed?

(4) Is the value of preliminary hearings in achieving due criminal process sufficient to offset the substantial costs of instituting such hearing where they are not currently employed?

I

ABSTENTION

Federal courts must abstain from taking affirm-

ative action in a case initiated in federal courts to declare a state procedural statute unconstitutional.

This court has refused to pass on the constitutional validity of state statutes affecting pending or future state court prosecutions when an adequate remedy at law exists. *Younger v. Harris, supra.* Here the effect of the action of the courts below is to hold inoperative a state statute prescribing certain methods for commencing and prosecuting a criminal action, *viz*, by an information of the prosecutor without a preliminary hearing. *Bradley v. Florida*, 265 So.2d 532 (Fla. App. 1972), cert. denied, 411 U.S. 916, 93 S.Ct. 1543, 36 L.Ed.2d 307; Rule 3.131, Rules of Criminal Procedure, Florida Rules of Court, 1974.

The court of appeals below does not view its action as interfering with a state prosecution since it only challenged "the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial." *Pugh v. Rainwater*, 483 F.2d 778, 782 (1973). What effect does the court's action have but, by this challenge and response, to attack the state prosecution? The district court attempted to avoid this dilemma by suggesting that its assumption of jurisdiction should not interrupt the prosecution. *Pugh v. Rainwater*, 332 F.Supp. 1107, 1115 (S.D. Fla. 1971). If prosecution was not interrupted in 1971, then a case or controversy is lacking here because presumably the prosecution would have been completed, and this court would be without jurisdiction.

Concerning whether an adequate remedy at law is available to a defendant claiming to have been denied a constitutional right, the court of appeals points out that not every pre-trial unconstitutional procedure, assuming there is one here, will entitle a state defendant to relief in federal court. For example, the victim of an unconstitutional search and seizure has no right to an injunction, but must seek to have the evidence excluded at trial. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A defendant who has not obtained a preliminary hearing and who argues the unconstitutionality of proceeding to trial without a magistrate's finding of probable cause stands in a substantially similar situation and can expect the prosecution to be dismissed at trial if the prosecution fails to establish a *prima facie* case. In addition, there is always the possibility that the defendant may, prior to trial, move to dismiss the information alleging a denial of due process in the filing of an information for which there exists no probable cause to believe he has committed the crime stated. This motion, denied in state courts, could be appealed to the federal courts.

II

CURRENT CONSTITUTIONAL STATUS OF A PRELIMINARY HEARING

As presently interpreted, the fourteenth amendment "Due Process" clause does not require a preliminary hearing following the filing of the Prosecutor's Information.

In this case appellants appear to have relied to a great extent on *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed. 1340 (1913), its progenitor, *Hurtado v. State of California*, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884), and *Ocampo v. United States*, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231 (1914). All of these are cited for the proposition that a preliminary hearing testing the sufficiency of a prosecutor's information *prior* to actual trial is not constitutionally required. In *Lem Woon* and, to some extent, *Ocampo*, this court held that the fourteenth amendment "Due Process" clause does not require a preliminary examination by a magistrate prior to the filing of an information. Ibid *Lem Woon* at 590, 33 St.Ct. 784.

The court has stated, referring to the *Hurtado* line of cases:

> "But since, as this court has so often held, the 'due process of law' clause does not require the state to adopt the institution and procedure of a grand jury, we are unable to see upon what theory it can be held that an examination, or the opportunity for one, prior to the formal accusation by the district attorney is obligatory upon the states." Ibid at 590, 33 S.Ct. at 784.

The Court of Appeals for the fifth circuit sees a significant distinction between *Hurtado*, *Lem Woon*, and *Ocampo* on one hand and this case on the other because here the question is whether due process requires a preliminary examination *after* an information is filed. *Pugh v. Rainwater, supra.* There

appears to be a distinction here, but it is, we submit, a distinction without difference, a distinction which in practice does not change the impact of criminal procedures on the defendant. The question before the Court in *Lem Woon* involved basically the constitutional validity of the prosecutor's information as a means of initiating the criminal processes. Since indictment by grand jury was not essential to the existence of due process in state criminal actions, the court was unwilling to say that a preliminary hearing prior to an information was essential. Given the Courts view of the matter, would it be logical then to argue that the question of a preliminary hearing to be conducted after an information is somehow different? A defendant's prospects of pre-trial confinement are not affected by whether the preliminary hearing is conducted first and, assuming a finding of probable cause, charged later by information or whether the information is filed first and then tested by a preliminary hearing. *Lem Woon* is authority for the Florida procedure observed prior to this case.

In Washington, criminal charges may be commenced in one of four ways: (1) an information filed by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) criminal complaint filed before a magistrate. Of these, the most common is the prosecutor's information. A complaint before a magistrate whether filed by the prosecutor or another complainant is followed by a preliminary hearing unless the prosecutor sub-

sequently files an information in Superior Court. *State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971).

Indictment by grand jury was adopted in the Fifth Amendment of the United States Constitution as a fair procedure for charging criminal acts in federal courts. *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 408 L.Ed. 397 (1956). *Hurtado v. California, supra*, indicated that the method was not the only fair way such proceedings could be instituted. *Lem Woon v. Oregon, supra*, and *Ocampo v. United States, supra*, indicated that indictment by prosecutor's information even without a preliminary hearing was another fair procedure. This approach was recognized by the Court in *Beck v. Washington*:

> "Ever since *Hurtado v. California*, 110 U.S. 516, 4 S.Ct. 292, 28 L.Ed. 232 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some years ago. Since that time prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as *Ocampo v. United States*, 234 U.S. 91, 345 S.Ct. 712, 58 L.Ed. 1231 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 33 S.Ct. 783, 57 L.Ed 1340 (1913)." *Beck v. Washington*, 369 U.S. 541, 545, 82A S.Ct. 955, 957-958, 8 L.Ed.2d 98, 104-105 (1962).

Respondent here asserts in essence that the information process without a judicial examination is unfair, and contrary to the fourth and fourteenth amendments. This assertion is apparently made not on the grounds that the Florida prosecutor, or prosecutors in general, are in the practice of wilfully or wantonly filing informations in cases in which there is insufficient evidence to initiate criminal proceedings or even on the grounds of doing so carelessly with such frequency as to make the practice of prosecutor initiated informations constitutionally unacceptable. They assert simply that fairness cannot be and is not obtained by a process from which judicial review of the charging decision is omitted. Therefore, in order to sustain the Circuit Court below, and respondent's position, *Lem Woon* and *Ocampo* must be reversed. The Court should not do that here. See also: *Austin v. United States*, 408 F.2d 808 (1969); *Sciotino v. Zampano*, 385 F.2d 132, 134 (1967), cert. denied 390 U.S. 906, 885 S.Ct. 820, 19 L.Ed.2d 872 (1968); *State v. Ollison*, 68 Wn. 265, 411 P.2d 419 (1966); cert. denied *sub nomine Wallace v. Washington*, 385 U.S. 874, 87 S.Ct. 149, 17 L.Ed.2d 101 (1966).

III

THE DECISION TO CHARGE AND THE PRELIMINARY HEARING

An analysis of the prosecutor's role in filing an information and of the effect in practice of preliminary hearings justifies a conclusion that there is

no absolute constitutional due process right to a preliminary hearing pursuant to the fourth and fourteenth amendments.

The circuit court below has cited language from several Supreme Court cases to the effect that judicial functions ought not become entangled in law enforcement, lest he who judges is tainted by the zeal of the chase and lose his power to judge objectively. The court cites *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942), which involved a police failure to bring an arrestee before a magistrate pursuant to statute until interrogation was completed. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970), which disapproved the practice of a prosecutor issuing search warrants. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1971), which involved the requirement for a custody hearing for a parolee on suspicion of another offense. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1971), concerning the authority of a clerk of a municipal court to issue an arrest warrant, and *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1938, 32 L.Ed.2d 556 (1971), which affected the legal efficacy of executing a lien on property without a prior hearing. None of these cases, of course, decided the issue specifically before this Court, and the circuit court did recognize a long line of fifth circuit cases which discounted "the existence of a due process right to a preliminary hearing." *Pugh v.*

Rainwater, supra, at 786. The circuit court, however, found that the sentiments and reasoning expressed in the Supreme Court cases cited applied to the circumstances of the instant case and concluded that the decision as to legal sufficiency to prosecute a given case is judicial and cannot be made finally without judicial review of the evidence, that the prosecutor, because of his advocate's role, is constitutionally incapable of making this decision, and that the due process clause requires states to conduct a preliminary hearing after an information is filed in all cases, felony and misdemeanor, where confinement could result. The court distinguished the contrary cases within the circuit by noting that in those cases the issue arose in the context of a challenge to the validity of a conviction on a charge filed by information without benefit of a preliminary hearing and did not come to the court solely on the question of a due process right to a preliminary hearing. *Pugh* at 786-787.

The Court of Appeals held that "due process abhors even the appearance of * * * entanglement between the prosecutorial and judicial functions as exist under the Florida information prosecution system" (*Pugh* at 787), and proceeded to adopt new criminal procedural rules for Dade County, Florida. The court did so in the belief that the new system will improve the quality of criminal justice in the state without adding to the cost of maintaining the system. If this were wholly true, there would be

little moral objection to it even if its constitutional necessity were questionable. The court, however, we believe, misapprehends the nature of the preliminary hearing and its value to attain minimum standards of due process.

The preliminary hearing, perhaps ideally, is employed to protect the defendant from oppressive and false prosecution and save both him and the public the expense and trauma of unnecessary trials. The formal conception of the preliminary hearing is that of a sort of minitrial wherein the prosecutor puts on at least the bulk of his case, the defendant counters with his defense, counsel debate the merits, and the judge determines whether the facts warrant the attention of a jury. The reality is a hearing more in the form of an *ex parte* proceeding with the defendant present. *Prosecution: The Decision to Charge a Suspect with a Crime.* Frank W. Miller, at 64-65.[1]

There are apparently a number of reasons for this, such as the unavailability in some places of counsel for indigents at the preliminary hearing, the objective of each party to avoid revealing their case to the other side, and the tendency of magistrates to give a cursory review of the evidence and rely on the prosecutor to make the correct charging

[1] *Prosecution: The Decision to Charge a Suspect with a Crime*, by Frank W. Miller, was published as the last volume in the report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States. The book is among the most thorough of materials dealing with the nature of the prosecutor's function and contains much information and insight into the preliminary hearing of a procedural device.

decision and on the trial court to finally sift the evidence. In addition, a preliminary hearing can be disadvantageous to the defense by setting porsecution witnesses in their testimony, solidifying the allegiance of the prosecutor's witnesses, increasing adverse publicity, and preserving adverse witnesses' testimony. Miller, at 46. Given the general real nature of preliminary hearings, it is appropriate to ask whether the preliminary hearing is a sufficiently useful evidence screening device as to make its availability a matter of constitutional imperative.

The typical approach by the prosecutor to a preliminary hearing, as observed by Miller, is to put on as little evidence as he feels is necessary to get a bind-over decision. Normally, this is accomplished through the testimony of one or two witnesses, usually the arresting officer and perhaps some sort of expert testimony. The prosecutor wants to give as little of his case to the defendant who in turn, even when represented by counsel, will seldom offer any rebuttal evidence preferring to save his ammunition for the jury. The result of this policy is that occasionally cases are dismissed or bound over when they should not be. This does not mean that the evidence available would actually be insufficient to provide probable cause to charge or that there is an affirmative defense, but simply that enough has not been offered. Miller, at 67-69. To some extent then, the committing magistrate and the preliminary hearing become a ritual to be observed: by the prosecutor,

because he needs the ruling to continue his prosecution, and by the defense who want to get as much insight into the state's case as possible without revealing their own line of defense. In addition, both deputy prosecutors and defense attorneys normally enter preliminary hearings having had too little time to investigate and prepare for a useful adversary probing of the issues. Part of the reasons defendants make no serious efforts to obtain a dismissal in most cases is their reliance on the thorough screening of the prosecutor prior to the preliminary examination to eliminate the weak cases. Miller at 76. If there is conscientious case screening by the prosecutor and indeed police officials, there is little need for further screening by a magistrate. The number of cases dismissed at preliminary hearings is quite low—probably an average dismissal rate of about two percent of all persons entitled to preliminary hearings which includes those who waive the preliminary hearing. Miller at 84.[2] Mr. Miller's study demonstrates that at least in Kansas, Michigan, and

[2] "In Wisconsin, less than 10 percent of the defendants given preliminary examinations are dismissed. In Kansas, a comparable dismissal rate prevails. In Michigan, statistics from Recorder's Court indicate that 17 percent are dismissed, but personnel in the Detroit prosecutor's office believe that 5 percent is a more accurate figure. In each of the three states, then, a very small percentage of defendants given preliminaries is dismissed.

"The dismissal rate at the preliminary drops even lower when waivers are considered. Thus, in Kansas, 66 percent of the defendants eligible for preliminaries waive them; in Wisconsin statistics indicate, with some doubt surrounding them, that 90 percent waive; in Michigan, 72 percent waive. When dismissals are considered in relation to all cases in which preliminaries are authorized by law, the dismissal rate in Kansas drops to 3 percent, in Michigan to 1.4 or 4.75 percent (depending upon which dismissal rate figures are used), and in Wisconsin to 1 percent. An average dismissal rate of 2 percent of all persons entitled to preliminaries is probably a substantially accurate reflection of current practice."

Wisconsin, an intensive prosecutor screening process effectively eliminates weak cases. It may be argued that the screening Miller observed was as intense as it was because of the existence of the preliminary hearing as a check and incentive to the prosecutor. This is a plausible argument, but in fact the preliminary hearing does not always have this salubrious effect. For example, at least in the recent past, the Cook County, Illinois, prosecutor's office tended to rely on the preliminary hearing as a screening device, anticipating the magistrate would play an active role in the hearing. The existence of such practice indicates that the effectiveness of the preliminary hearing as a screening device depends on the degree to which the prosecutor chooses to delegate charging decisions to the magistrate. Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. Ill. L.F. 584, at 625-627.

It does not follow that the existence of a preliminary hearing in a criminal action is of such significance to the rights and defense of the accused as to elevate the hearing to the level of a constitutional imperative. The workload borne by prosecutor's offices, particularly in our urban areas, encourages prosecutors to weed out weak cases and charge only in instances where the probability of conviction is high. Miller at 101. There are some indications that prosecutors are concerned about a good conviction record. This factor, to the extent it plays a part in

the decision to prosecute, together with the desire to avoid conviction of the innocent and mitigate the harshness of the law by applying a measure of human tolerance to the rigid letter of the law, and the workload and limited time and manpower resources of prosecutor offices all tend to encourage early and critical screening of criminal allegations and to encourage the application of a standard to the charging decision based on the probability of ultimate conviction rather than the less demanding standard of probable cause to believe that the defendant committed the crime. Miller at 342-343.

Mr. Miller has found in the course of his limited study that magistrates tend to apply one of three standards in deciding whether to bind over the defendant. They may see their function as solely to test the sufficiency of the evidence to go to the jury (whether a *prima facie* case has been established). Even if the defendant offers evidence of a plausible affirmative defense, the magistrate may choose not to invade the province of the jury. Or the judge may see his function as that of screening out unconvictable people, a standard normally adopted by prosecutors to govern their own charging decisions. Finally, the magistrate may bind the defendant over if a *prima facie* case is indicated, but advise dismissal if the defendant appears unconvictable. Miller at 93-94.

None of these standards sifts the cases more finely than the prosecutor's convictability standard.

Still, even if one accepts the proposition that prosecutors would normally fairly and expeditiously perform their screening function and that a subsequent preliminary hearing would add little toward just and due process, there still remains the possibility of wrongly motivated prosecutorial acts wherein the defendants are charged when there is little basis for invoking the criminal process. Is there, in these comparatively few situations, a justification for imposing a constitutional requirement for a preliminary hearing in all cases, felony and misdemeanor where confinement may result?

The preliminary hearing schedule adopted by the District and Court of Appeals below places tight time restrictions on filing the information and preparing for the hearing. One effect, we submit, is to substantially reduce the prosecutor's role in the decision to charge. He is more likely to file an information on the appearance that the defendant has committed a crime, put on the necessary quantum of evidence to get the magistrate to bind over the case, and then, at greater leisure and upon fuller investigation, determine whether he really wants to prosecute. If he does not file immediately, he may lose the opportunity to do so later if the putative defendant is no longer available. The effect arguably is to have persons charged and confined following the hearing who would otherwise not have been charged. But on the other hand, a less aggressive prosecutor would have the tendency to act more conservatively and

avoid charging suspects when he does not believe from the evidence initially available that he will be able ultimately to get a conviction. This could account for the reduction in the Dade County felony case load mentioned in the court of appeals opinion. *Pugh v. Rainwater*, 483 F.2d 778, 787 (1973). At any rate, it would be wrong to conclude from this sole statistic that a preliminary hearing is a *sine qua non* for due process and judicial economy.

Section 6.02 of the American Law Institute Model Code of Pre-Arrangement Procedure (1966) provides that the prosecutor shall be the party with primary responsibility for filing a complaint charging a person with an offense. See also Comment on § 6.02, ALI Model Code of Pre-Arraignment Procedure (1966).

The courts below were concerned about the remedies available to a defendant charged by information who wishes to challenge the legality of his detention. He has, of course, the same remedy as a defendant arrested without probable cause or who is held following a search without probable cause or who gives an inadmissible statement or confession. At trial or at a pre-trial hearing on procedural questions suppression of evidence and statements often results in dismissal. If the evidence on which the information is based is insufficient a defense motion to dismiss will be granted. In addition, in Washington, a recent case, *State v. Jefferson*, 79 Wn.2d 345, 485 P.2d 77 (1971), suggests that a defendant in a

case brought by information without a preliminary hearing may challenge the validity of the prosecutor's decision by a motion to dismiss the information. Although the Supreme Court of Washington did not find the facts to justify a dismissal in *Jefferson*, the opinion suggests that a proven abuse of the prosecutor's discretion in arbitrarily and capriciously filing an information constitutes a denial of due process or of equal protection warranting dismissal of the information. *Jefferson* at 80.

Another student of the function of the preliminary hearing and a former county prosecutor has observed:

> "Although the preliminary hearing theoretically can serve many important functions insuring the fair administration of criminal justice at the pre-trial stage, in practice it often fails to perform its functions well.
>
> "When held, the hearing often fails to serve as an effective evidentiary screen to weed out unfounded charges. There are many reasons for this. First of all, a large proportion of magistrates and justices of the peace who are supposed to make an informed 'judicial' determination of probable cause have had little or no formal legal training. Secondly, these judicial officers often have a heavy workload because they usually have jurisdiction to try most misdemeanor and all petty offense cases in addition to their power to process the preliminary stages of felony cases. The large volume of cases of all types processed by each magistrate, particularly in urban areas, is reflected in delay and inability

> to give more than cursory consideration to individual cases. * * *" Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or more of the Same?*, 35 Mo.L. Rev. 281 (1970).

Professor Anderson recognizes the possibility that the preliminary hearing can be an effective "mechanism for determining the legality of detention." Anderson at 291. He argues, however, that the tendency has been to judicialize the preliminary hearing more and more until we are "confronted with at least a *de facto* 'two trial' criminal process," Anderson at 324, where the judge, prosecutor, and defense all take an active part in the preliminary hearing as an adversary encounter. This is a multi-purpose preliminary hearing that is supposed to serve as a discovery device, a mechanism for determining probable cause to arrest and detain, and probable cause to bind the defendant over for trial. In trying to accomplish too much, it does nothing well. Anderson at 297-300. He concludes in part:

> "However, in our increasingly urban society the numerous theoretical benefits of such a 'preliminary trial' would seldom be realized in practice. Again using past history as a guide, we would predict that 'assembly line preliminary trials' would be held in overloaded lower court systems. Even if there were a constitutional mandate to hold preliminary hearings, it is doubtful that society would willingly provide sufficient additional resources to permit development of an adequate 'two trial' criminal

process. Furthermore, considering the functional compromises that must be made in any attempt to improve a preliminary, adversary, multipurpose judicial hearing, it does not appear sensible in theory to 'judicialize' or to absolutely require the hearing—assuming that better and less costly alternative procedures could be made available."

This state, Washington, in its Rules of Court, already provides a discovery device in the context of an "omnibus hearing," and we do not believe that a preliminary hearing is unconstitutionally or practically required to pass on the correctness of the prosecutor's screening decisions for the reasons given. We believe that for the court to constitutionally require the adoption of the lower courts' plan by state courts would unnecessarily interfere with the state's criminal jurisdiction, would further institutionalize a process of little real value, and add significant real physical burdens on court mechanisms that may detract from, rather than enhance, the quality of justice.

IV

DUE PROCESS IS APPROACHED BY BALANCING COMPETING FACTORS

The quality by which due process in state courts will be enhanced by requiring preliminary hearings is so slight as to be offset by the heavy total costs of thus enlarging state criminal procedures.

In search for due process in a state's criminal

procedure, the Court will look beyond the forms to the substance of process and it will consider the whole course of the criminal proceedings and not merely a single step. *Frank v. Magnum*, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915). It is our view that to require as a matter of due process preliminary hearings in all cases where prosecution is by information, rather than improve the quality of justice, would create new frustrations and impediments to the timely adjudication of criminal matters. If this Court sustains the substance of the District Circuit Court rulings the impact upon criminal courts at least in this state would be dramatic. Every information filed for an offense carrying a jail sentence, be it felony or misdemeanor, would have to be followed by a preliminary hearing, requiring, it is reasonable to assume, a staggering augmentation in courtroom space, judge time, court personnel, both administrative and judicial, prosecutor staff and facilities, witness availability and cost to the public of supporting the expanded procedure. These factors, of course, do not constitute the sole yardstick by which constitutional innovations are measured. Still, these are factors that should weigh in the decision of the court, particularly when, as we assert, the availability of "fundamental fairness" is not threatened by present procedures. The difficulty of defining due process in quantitive terms indicates the elusive quality of that element of judicial mechanism. Its essence is best approached when we have fairly balanced competing interests within the mechanism. The Court must

weigh what is to be gained by requiring a preliminary hearing and the likelihood of gaining it against the cost of such a step.

The instant case presents a situation in which it can be seen that the quality of due process will be little advanced by sustaining the rulings of the courts below.

CONCLUSION

The standards of due process in criminal prosecutions are not compromised by a procedure initiated by a prosecutor's information without a preliminary hearing. The Court's past decisions on this question justify this view. The effectiveness of the information procedure, the perfunctory tendencies of preliminary hearings, and the substantial costs of imposing a requirement for preliminary hearings in confinement cases militate for rejection of respondents position. For these reasons we respectfully urge this court to reverse the decision of the Court of Appeals of the Fifth Circuit.

Respectfully submitted,

SLADE GORTON,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

KEVIN M. RYAN,
Assistant Attorney General.